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No. ——

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

CEMENT KILN RECYCLING COALITION,
HOLNAM, INC.,
LONE STAR INDUSTRIES, INC., and
SAFETY-KLEEN CORP.,
Petitioners,

v.

CAROL M. BROWNER, ADMINISTRATOR,
U.S. ENVIRONMENTAL PROTECTION AGENCY, and
U.S. ENVIRONMENTAL PROTECTION AGENCY,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Given that precedents of this Court and the Ninth Circuit hold that federal courts cannot sever improper provisions from agency regulatory schemes, but must remand the regulations to the agency, did the D.C. Circuit err by disregarding these precedents and severing one "tier" from a multitiered EPA regulatory scheme?

2. To determine the severability of an incorrectly-promulgated regulatory provision, should a federal court import the "presumptive severability" test that determines the severability of unconstitutional statutory provisions, or apply the "substantial doubt" test that then-Judge Scalia developed to determine the severability of federal regulatory provisions?

3. Given that the rulemaking record shows that EPA intended to promulgate a site-specific combustion efficiency standard to enable a distinct class of furnaces to demonstrate combustion efficiency, and that EPA considered, and could have created, different standards that would have enabled these furnaces to demonstrate combustion efficiency, did the D.C. Circuit err by severing the site-specific standard and requiring the furnaces for which it was created to show combustion efficiency using arbitrarily-restrictive standards that were designed for use by a different class of facility?

4. Given that the rulemaking record shows that EPA intended to provide flexibility and avoid major economic impacts on the regulated community by regulating two different classes of facilities under two different sets of combustion efficiency standards, did the D.C. Circuit err by severing the standard that distinguished EPA's two regulatory schemes, thus creating a new, arbitrarily-restrictive, and unitary regulatory scheme that EPA had never contemplated?

5. Given that precedents of this Court and the Seventh Circuit indicate that courts reviewing agency regulations

should have severability issues briefed by the agency and the challengers, did the D.C. Circuit err by disregarding these precedents and severing one "tier" from a multi-tiered EPA regulatory scheme, even though no party ever sought that relief, EPA never briefed the issue of severability, and EPA implicitly conceded that the provision was inseverable?

LIST OF ALL PARTIES TO THE PROCEEDING IN THE COURT WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED

A. List of Parties to the Proceedings in the United States Court of Appeals for the District of Columbia Circuit.

The following entities were parties to the consolidated case *Horsehead Resource Development Co. v. Browner*, Nos. 91-1221, et al. (D.C. Cir.): AKJ Industries; American Mining Congress; American Petroleum Institute; American Coke and Coal Chemicals Institute; American Iron & Steel Institute; Association of Battery Recyclers, Inc.; B.F. Goodrich Company; Battery Council International; Cement Kiln Recycling Coalition; Chemical Manufacturers Association; Chemical Coalition; Chemical Waste Management, Inc.; Citizens for A Safe Environment; Citizens Aware and United for a Safe Environment; Clean Water Fund of North Carolina; Continental Cement Company; Cyprus Miami Mining Corporation; Dow Chemical Company; Edison Electric Institute, et al.; Giant Group Ltd.; Hazardous Waste Treatment Council; Holnam, Inc.; Horsehead Resource Development Company, Inc.; International Metals Reclamation Company, Inc.; International Mill Service; Lafarge Corporation; Lone Star Industries, Inc.; Marine Shale Processors, Inc.; Monsanto Corporation; National Solid Wastes Management Association; Natural Resources Defense Council; RSR Corporation; Safety-Kleen Corporation; Saucon Association for a Viable Environment, Inc.; Sierra Club; Solite Corporation; Steel Manufacturers Association; Tennessee Eastman Company;

the U.S. Environmental Protection Agency; and Carol M. Browner, the Administrator of the U.S. Environmental Protection Agency.

B. List of the Parent Companies and Subsidiaries of the Parties Filing This Petition.

Cement Kiln Recycling Coalition

The Cement Kiln Recycling Coalition ("CKRC") is a trade association. CKRC has no parent company, subsidiary, or affiliate that has issued shares or debt securities to the public.

Holnam, Inc.

Holnam, Inc. ("Holnam") was incorporated on May 8, 1981, under the laws of the State of Delaware. Holnam is a privately-held corporation. All of the outstanding shares of Holnam stock are owned by Holdernam, Inc. ("Holdernam"), a Delaware corporation. Holdernam, in turn, is a wholly-owned subsidiary of "Holderbank" Financier Glaris, Ltd. ("Holderbank"), a publicly-traded Swiss corporation. Mr. Thomas Schmidheiny of Switzerland has effective voting control of Holderbank. Holman holds an approximate 60% interest in St. Lawrence Cement, Inc. ("St. Lawrence"), a publicly-traded Canadian Corporation. St. Lawrence was incorporated in Quebec, Canada in 1951. St. Lawrence is operated by separate management and does business directly and through wholly-owned subsidiaries in Eastern Canada and portions of the Northeast and Middle Atlantic regions of the United States.

Lone Star Industries, Inc.

Lone Star Industries, Inc. ("Lone Star") was incorporated on October 14, 1968, under the laws of the State of Delaware. Lone Star is a publicly-traded corporation, with its common stock listed on the New York Stock Exchange, Inc. under the symbol LCE. According to information supplied to Lone Star, Metropolitan Life Insurance

Company and Metropolitan Insurance and Annuity Company is the beneficial owner of 16.9% of the outstanding stock and warrants of Lone Star. The TCW Group, through its affiliate TCW Special Credits could be deemed to be the beneficial owner of 11.9% of Lone Star's outstanding stock and warrants. Lone Star does not believe, however, that this ownership is such as to make either of these parties a "parent" of Lone Star, as that term is used in Supreme Court Rule 29.1. Lonestar has no subsidiaries that are not wholly-owned.

Safety-Kleen Corp.

Safety-Kleen Corp. ("Safety-Kleen") is incorporated under the laws of the State of Wisconsin. Safety-Kleen is a publicly-traded corporation with its common stock listed under the symbol SaKl. Its principal offices are in Elgin, Illinois. Safety-Kleen has no parent companies or subsidiaries (except wholly-owned subsidiaries).

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OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS DELIVERED IN THE CASE BY COURTS OR ADMINISTRATIVE AGENCIES

A. Reports of the Opinion of the United States Court of Appeals for the District of Columbia Circuit.

Horsehead Resource Development Co. v. Browner, No. 91-1221, slip op. (Feb. 22, 1994) (per curiam).

Horsehead Resource Development Co. v. Browner, 16 F.3d 1246 (D.C. Cir. 1994) (per curiam).

Horsehead Resource Development Co. v. Browner, 38 Env't Rep. Cas. (BNA) 1073 (1994) (per curiam).

Horsehead Resource Development Co. v. Browner, 24 Envtl. L. Rep. 20,562 (1994) (per curiam).

B. Preambles to Rules and Proposed Rules Published by the United States Environmental Protection Agency.

1. Proposed Rule and Request for Comment, 52 Fed. Reg. 16,982 (May 6, 1987), *reprinted in* Appendix to Petition for Certiorari, at 173a [hereinafter 52 Fed. Reg. at ——, App. at ——].

2. Supplement to Proposed Rule, 54 Fed. Reg. 43,718 (Oct. 26, 1989), *reprinted in*, Appendix at 144a [hereinafter 54 Fed. Reg. at ——, App. at ——].

3. Proposed Rule, Supplemental Proposed Rule, Technical Corrections, and Request for Comments, 55 Fed. Reg. 17,862 (Apr. 27, 1990), *reprinted in* Appendix at 109a [hereinafter 55 Fed. Reg. at ——, App. at ——].

4. Final Rule, 56 Fed. Reg. 7134 (Feb. 21, 1991), *codified at* 40 C.F.R. §§ 260-61, 264-66, 270-71 (1993), *reprinted in* Appendix at 64a [hereinafter 56 Fed. Reg. at ——, App. at ——].

5. Final Rule: Technical Clarification Amendments and Corrections, 57 Fed. Reg. 38,558 (Aug. 25, 1992), *codified at* 40 C.F.R. § 266-104(f) (1973), *reprinted in* Appendix at 50a [hereinafter 57 Fed. Reg. at ——, App. at ——].

STATEMENT OF JURISDICTIONAL GROUNDS

This petition seeks review of a decision of the United States Court of Appeals for the District of Columbia Circuit, entered on February 22, 1994, *reprinted in* Appendix at 1a. *Horsehead Resource Development Co. v. Browner*, 16 F.3d 1246 (D.C. Cir. 1994) (per curiam) [hereinafter

Horsehead, 16 F.3d at ——, App. at ——]. Petitioners filed a petition for rehearing of this decision on April 8, 1994. The United States Court of Appeals for the District of Columbia Circuit denied the petition for rehearing on April 29, 1994. The Court has discretionary jurisdiction to review this decision under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED IN THIS CASE

42 U.S.C. § 6924 provdes in relevant part:

> § 6924. *Standards applicable to owners and operator of hazardous waste treatment, storage and disposal facilities.*
>
> . . . .
>
> (q) *Hazardous waste used as fuel.* (1) Not later than two years after the date of the enactment of the Hazardous and Solid Waste Amendment of 1984, and after notice and opportunity for public hearing, the Administrator shall promulgate regulations establishing such—
>
> . . . .
>
> (B) standards applicable to the owners and operators of facilities which burn, for purposes of energy recovery, any fuel produced as provided in subparagraph (A) or any fuel which otherwise contains any hazardous waste identified or listed under section 3001 . . . .
>
> . . . .
>
> as may be necessary to protect human health and the environment. . . .

EPA promulgated regulations under this statutory provision. *See Burning of Hazardous Waste in Boilers and Industrial Furnaces*, 56 Fed. Reg. 7134 (Feb. 21, 1991); *and corrected*, 56 Fed. Reg. 32,688 (July 17, 1991); *amended*, 56 Fed. Reg. 42,504 (Aug. 27, 1991); *stayed in part and amended* 56 Fed. Reg. 43,874 (Sept. 5, 1991); *amended in relevant part and corrected*, 57 Fed. Reg. 38,558 (Aug. 25, 1992); *amended and corrected*, 57 Fed.

Reg. 44,999 (Sept. 30, 1992); *codified in relevant part at* 40 C.F.R. § 266.104 and *codified at* 40 C.F.R. §§ 260-61, 264-66, 270-71 (1993). These regulations are reproduced in relevant part in the Appendix to the Petition for Certiorari (the "Appendix").

STATEMENT OF THE CASE

The Court should grant this petition for a writ of certiorari because the D.C. Circuit's decision to sever one of three combustion efficiency standards promulgated by EPA blatantly disregards the precedents of this Court, conflicts with the precedents of other federal circuits and ignores the agency intent manifested in EPA's rulemaking record. In *Addison v. Holly Hill Fruit Products, Inc.*, 322 U.S. 607 (1944) and *Federal Power Commission v. Idaho Power Co.*, 344 U.S. 17 (1952), this Court held that courts reviewing the regulations of administrative agencies must remand regulations containing improper regulatory provisions. The Court recognized that severing regulatory provisions could change the intended effect of regulations and thus intrude upon the agency's administrative authority. By disregarding this Court's precedents, the D.C. Circuit has usurped EPA's administrative authority and created conflicts between its precedents and those of other circuits that follow *Federal Power Commission. See, e.g., Thompson v. United States Dep't. of Labor*, 885 F.2d 551 (9th Cir. 1989).

The EPA regulations discussed in this petition require cement kilns that burn hazardous waste derived fuels ("HWDF") to use one of three standards to demonstrate the quality of their fuel combustion process. In *Horsehead Resource Development Co. v. Browner*, Petitioners sought judicial review of EPA's three-tiered standards for showing combustion efficiency. *See* 42 U.S.C. § 6976. The D.C. Circuit found that the site-specific "Tier III" standard that EPA created to enable Petitioners' kilns [1] to

[1] The term "Petitioners' kilns" means the kilns of Petitioners Holnam and Lone Star Industries, and any other kilns eligible to use EPA's Tier III standard.

demonstrate combustion efficiency was neither adequately noticed, nor reasonably supported by the rulemaking record. To remedy EPA's error, the D.C. Circuit severed the incorrectly-promulgated Tier III standard and required Petitioners' kilns to assess their combustion efficiency using the two remaining standards—even though the D.C. Circuit admitted that the raw materials used in Petitioners' kilns can preclude them from showing combustion efficiency under these two standards. Under the D.C. Circuit's two-tiered regulatory scheme, Petitioners' cement kilns, which do maintain good combustion conditions, will have no way to prove it—and will thus be precluded from using HWDF.

Under Supreme Court Rule 10, the Court should grant a writ of certiorari to review the D.C. Circuit's decision. First, this Court has not, but should, articulate a test for analyzing the severability of regulatory provisions, and thus end conflicts between precedents that presume the severance of improper unconstitutional statutory provisions, and precedents that preclude the severance of improper regulatory provisions. *See* Sup. Ct. R. 10.1(c) (the Court may grant review to consider important and unsettled issues of federal law). Both *Addison v. Holly Hill Fruit Products, Inc.*, 322 U.S. 607 (1944) and *Federal Power Comm'n v. Idaho Power Co.*, 344 U.S. 17 (1952) strongly condemned federal courts that had severed elements from agency regulatory regimes and directed that severability issues should be remanded to the agency to avoid judicial intrusion into an agency's regulatory discretion. However, *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281 (1988), without citing *Addison, Federal Power Commission,* or any other case, briefly discussed a very easy regulatory severability issue using language suggestive of the "presumptive severability" test applied to unconstitutional statutory provisions. The D.C. Circuit, the circuit primarily responsible for reviewing EPA regulations, has followed both lines of authority when addressing the severability of regulatory provisions.

Second, this Court has repeatedly held that improper regulatory provisions should be remanded, not severed, *Addison*, 322 U.S. at 618-19, and that legislative or administrative intent determines severability. *See, e.g., Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 683 n.5, 684 (1987). The D.C. Circuit ignored both of these principles and severed EPA's Tier III standard—even though EPA's rulemaking record showed that EPA never intended to regulate Petitioners' kilns without Tier III and that EPA could have corrected the problems in the promulgated Tier III standard. *See* Sup. Ct. R. 10.1(c) (the Court may grant review when a federal court of appeals has decided a federal question in a way that conflicts with applicable Supreme Court decisions). Third, the D.C. Circuit severed provisions from EPA's regulations even though EPA never sought such relief, never briefed the issue of Tier III's severability, and implicitly conceded that Tier III was not severable. This D.C. Circuit procedure of deciding severability *sua sponte* conflicts with the Seventh Circuit procedure of requiring supplemental briefs, and greatly increases the risk of intrusion into an agency's regulatory authority. *See* Sup. Ct. R. 10.1(a) (the Court may grant review when a lower court departs from the accepted and usual course of judicial proceedings).

The difficulty of determining legislative intent requires courts to presume that unconstitutional provisions in federal statutes are severable, absent evident legislative intent to the contrary. Because courts should not intrude upon administrative discretion, and because a rulemaking record usually shows administrative intent, cases such as *Addison* and *Federal Power Commission* refused to presume the severability of incorrectly-promulgated regulations. During his tenure on the D.C. Circuit, Justice Scalia synthesized the holdings of *Addison* and *Federal Power Commission* and devised a "substantial doubt" test for determining the severability of regulatory provisions. *See North Carolina v. Federal Energy Regulatory Comm'n*, 730 F.2d 790 (D.C. Cir. 1984). This "substantial doubt" test har-

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monizes the holdings of *Addison, Federal Power Commission* and even *K Mart v. Cartier*. Petitioners respectfully submit that the Court should adopt the "substantial doubt" test.

However, under any test for severability, the Court should reverse the D.C. Circuit's severability holding. The D.C. Circuit severed EPA's only site-specific combustion efficiency standard, and the only standard that was specifically designed for Petitioners' kilns. EPA expressly found that regulations limiting the methods of showing good combustion should include a standard that could be used in Petitioners' kilns. By using severance to "overrule" this undisputed and reasonable EPA finding, the D.C. Circuit has intruded upon the regulatory authority Congress delegated to EPA.

STATEMENT OF FACTS [2]

Petitioners own or operate cement kilns. Petitioners' kilns are multi-million dollar industrial furnaces used to manufacture portland cement, one of the most widely-used building materials in the world. A cement kiln is a nearly-horizontal rotating cyclinder. One end of the kiln connects to a raw material feed and an exhaust stack; the other end is slightly lowered. To make cement, the operator heats the kiln by burning fuel in its lower end. The operator then feeds large quantities of limestone and shale into the raised end of the kiln. As gravity moves these materials down the rotating kiln, intense heat (upwards of 2500 degrees Fahrenheit) calcines the raw materials into "clinker," which is later ground to make the prin-

[2] The facts set forth in this section are drawn from EPA's rulemaking record or the opinion of the D.C. Circuit. Petitioners will cite to the D.C. Circuit's opinion where it is consistent with the facts in the rulemaking record. However, the severability issues addressed in this Petition turn upon EPA's intent. Petitioners will therefore show EPA's intentions, where appropriate, by citing to the preambles EPA published in the Federal Register to explain proposed or promulgated regulations.

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cipal ingredient in cement. *See Horsehead*, 16 F.3d at 1264-65, App. at 35a-38a.

To generate the intense heat needed to make cement clinker, Petitioners' kilns burn fossil fuels and hazardous waste derived fuels ("HWDF"). Burning HWDF offers three major benefits: 1) it recovers valuable energy from hazardous wastes; 2) it conserves irreplaceable fossil fuel resources; and 3) it lowers the marginal cost of cement production by replacing expensive fossil fuels with less-expensive HWDF fuels that some Petitioners are actually paid to burn. *See id.* In the highly-competitive cement market, kilns not burning HWDF are competitively disadvantaged.

On February 21, 1991, EPA promulgated final rules on the burning of HWDF in boilers and industrial furnaces. *See Burning of Hazardous Waste in Boilers and Industrial Furnaces*, 56 Fed. Reg. 7134, App. at 64a (the "BIF Rule"). Many parties regulated under the BIF Rule petitioned for judicial review in the United States Court of Appeals for the District of Columbia Circuit. Petitioners' challenge to the BIF Rule provisions intended to address "products of incomplete combustion" ("PICs") was consolidated with other challenges under the lead case name *Horsehead Resource Development Co. v. EPA*.[3]

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[3] Two groups of BIF Rule challengers have filed this Petition. Petitioner Cement Kiln Recycling Coalition ("CKRC") challenged EPA's PIC control regulations within ninety days after their initial promulgation. Later, EPA promulgated a "technical amendment" that altered the initially-promulgated combustion efficiency assessment methods. Petitioners Holnam, Inc., Lone Star Industries, Inc. and Safety-Kleen Corp., who are also CKRC members, challenged the technical amendment. Because the D.C. Circuit never specifically addressed issues relating to the technical amendment, this Petition focuses on the challenge brought by CKRC.

A. EPA Created Flexible, Technology-Based Combustion Efficiency Standards to Supplement a 99.99% Destruction Efficiency Requirement That Generally Prevents Significant Emissions of PICs.

HWDF can contain toxic organic compounds. To ensure that the burning of HWDF does not emit these compounds into the environment, boilers or industrial furnaces ("BIFs") must show that their combution process destroys 99.99% of the principal organic hazardous components in the HWDF. This 99.99% destruction/removal efficiency standard ("99.99% DRE") generally precludes emissions of toxic organics, and Petitioners have never challenged it. *Horsehead*, 16 F.3d at 1264, App. at 34a-36a.

EPA speculated, however, that 99.99% DRE might not prevent the emission of all harmful organics. EPA believed that an inefficient combustion process might create potentially toxic "products of incomplete combustion" ("PICs"), despite testing that led EPA to conclude that: "the risk posed by PIC emissions is probably not significant when combustion devices achieve 99.99 percent DRE . . . even though they may operate at less than maximum combustion efficiency." 52 Fed. Reg. at 16,998, App. at 185a; *accord* 56 Fed. Reg. at 7153, App. at 86a ("available data do not show that PICs are likely to pose a significant health risk"). As a result, EPA imposed additional regulations.

These additional regulations addressing the risks of PIC formation are the subject of Petitioners' rulemaking challenge. EPA requires facilities to maintain good combustion when burning HWDF, on the theory that "PIC emissions do not pose significant risks when BIFs and incinerators are operated under good combustion conditions." 56 Fed. Reg. at 7150, App. at 71a. Initially, EPA's approach was based on a simple assumption: emissions of certain indicators would increase as combustion conditions deteriorated. Accordingly, EPA required all boilers and furnaces not to exceed a level of carbon monoxide ("CO") emissions associated with good com-

bustion in incinerators. But as EPA became familiar with the differing combustion characteristics of various boilers and furnaces, the agency realized that it could not rely on a single indicator parameter or a single level to measure good combustion.

As a result, EPA consistently expanded its regime for assessing combustion efficiency as previously-proposed standards proved arbitrarily restrictive. When EPA found that factors unrelated to the quality of HWDF combustion precluded certain boilers and furnaces from proving good combustion under EPA's initial "Tier I" standard, EPA created a "Tier II" standard, stressing that standards should be "flexible" and "avoid major economic impacts on the regulated community." 54 Fed. Reg. at 43,722, App. at 147a. When EPA found that factors unrelated to the quality of HWDF combustion precluded cement kilns without bypass ducts from proving good combustion under Tiers I or II, EPA found it "reasonable to develop an alternative means for this class of furnace to demonstrate combustion efficiency." 56 Fed. Reg. at 7156, App. at 94a-95a. Although EPA intended to create a regulatory scheme that addressed this recurring problem, it was EPA's ultimate failure to develop a reasonable approach for this class of cement kilns that led to Petitioners' challenge.

B. The Three-Tiered Structure of the Final Combustion Efficiency Standards Shows That EPA Intended to Create Alternative Combustion Efficiency Standards, at Least One of Which Could Be Used by Each Type of BIF.

EPA ultimately promulgated a three-tiered scheme for assessing the efficiency of a BIF's combustion process. EPA promulgated these three tiers in stages, each tier intended to eliminate arbitrary bars to compliance imposed by previously-promulgated tiers:

- Tier I, a "carbon monoxide standard" first proposed in 1987, imposes a CO emission limit of of 100 ppmv, calculated as an hourly rolling

average,[4] *see* 40 C.F.R. § 266.104(b), App. H at 199a;

- Tier II, an "alternative carbon monoxide standard" first proposed in 1989, imposes a total hydrocarbon ("THC" or "HC") emission limit of 20 ppmv, calculated as an hourly rolling average, *see id.* at § 266.104(c), App. H at 199a; or
- Tier III, an "alternative HC limit" first proposed in 1991, creates a dual-baseline standard under which each site conducts a series of trial burns using only fossil fuels, averages the highest hourly rolling average CO and HC emissions in at least three runs, and uses these "averaged hourly rolling averages" as not-to-be-exceeded limits for HC and CO emissions during the burning of HWDF, *see id.* at § 266.104(F), App. H at 199a.

Throughout this process, the problem of assessing combustion efficiency in cement kilns recurred. EPA had assumed that the levels of CO and HC emitted at a facility's stack would result from the combustion of HWDF and fossil fuel. In a cement kiln, this assumption is simply wrong. Cement kilns heat raw materials, such as limestone and shale, to very high temperatures. As these raw materials heat, they emit CO and HC. Most of the CO or HC a cement kiln emits will have been generated by calcining raw materials—not by HWDF combustion.

By 1989, commenters persuaded EPA that many cement kilns with good combustion conditions emit elevated levels of CO and HC. *See* 54 Fed. Reg. at 43,721, App. at 146a. EPA acknowledged that neither Tier I nor Tier II could be used to assess combustion efficiency if the raw materials used to make cement contained trace levels of organic material:

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[4] Monitoring equipment records CO or HC levels, expressed as parts per million by volume ("ppmv") once every minute. To calculate an hourly rolling average, the sixty most recent records are averaged. The average is "rolling" because it is recalculated every minute.

> Normal raw materials such as limestone can contain trace levels of organic materials that oxidize incompletely as the raw material moves down the kiln from the feed end to the hot end where fuels are normally fired. Clearly, any THC (or CO) resulting from this phenomenon has nothing to do with combustion of hazardous waste fuel. Thus, an incinerator and a preheater or precalciner cement kiln with exactly the same quality of combustion conditions may have very different THC (or CO) levels.

54 Fed. Reg. at 43,724, App. at 155a; *accord, Horsehead*, 16 F.3d at 1266, App. at 38a-40a.

EPA proposed two solutions for cement kilns. First, EPA recognized that some kilns happened to be equipped with bypass ducts that could be adapted to sample CO and HC levels in HWDF combustion gases in the furnace —before such gases could mingle with raw-material-generated CO and HC. Other kilns (such as Petitioners') were neither designed nor built with bypass ducts.[5] EPA therefore requested comment on "whether an approach to identify a site-specific THC limit representative of good operating practices may be feasible (e.g., where THC levels when burning hazardous waste would be limited to baseline THC levels without burning hazardous waste)." 54 Fed. Reg. at 43,724, App. at 155a. EPA repeated the "site-specific THC limit" proposal in 1990. *See* 55 Fed. Reg. at 17,885, App. at 127a-28a.

In 1991, EPA promulgated its final BIF Rule. The final rule resolved the problem of raw-material-generated CO and HC by creating two classes of BIFs. The first class consisted of boilers and cement kilns with bypass ducts—all those facilities that were able to assess the

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[5] Several types of cement kilns exist—precalciner, preheater, wet-process and dry-process kilns. For purposes of this Petition, the critical distinction is between those kilns that were built with a bypass duct leading down to the furnace (generally, precalciners, preheaters and some dry-process kilns) and those that were not (generally, wet-process kilns and some dry process kilns as well). In the D.C. Circuit, Petitioners used the terms "wet kilns" or "wet process kilns" to describe those kilns that lack a bypass duct. *Horsehead*, 16 F.3d at 1266, App. at 38a-40a.

levels of CO and HC generated by their HWDF combustion process.[6] This class of facilities was required to show combustion efficiency using Tiers I or II. *See* 56 Fed. Reg. at 7221, App. 223a-25a, *codified at* 40 C.F.R. § 266.104(f) (1993) (stating that cement kilns with bypass ducts cannot use "Tier III").

Cement kilns without bypass ducts constituted a separate class of BIFs. *See* 56 Fed. Reg. at 7156, App. at 95a. EPA did not preclude kilns without bypass ducts from using Tiers I and II, but EPA admitted that organic matter in raw materials might preclude such kilns from showing good combustion under Tiers I or II. *Id.* EPA therefore created a "Tier III" expressly for such kilns. EPA made the following critical findings:

> A number of commenters requested that EPA allow cement kilns, lightweight aggregate kilns, and lime kilns that cannot meet the 20 ppmv HC limit because of the hydrocarbons generated by trace levels of organic materials in the normal raw materials to establish a site-specific alternative HC limit that does not allow HC levels when burning hazardous waste to be significantly higher than when burning normal fuels, processing normal raw materials, and producing normal products in a system that is designed and operated to minimize hydrocarbon concentrations in stack gases.
>
> . . . .
>
> The Agency believes that it will be possible in some situations to develop an approach on a case-by-case basis to effectively implement an alternative HC limit under the principle stated above. (If the 20 ppmv HC limit were health-based, the Agency would be more reluctant to develop an alternative to it. Given, however, that the limit is a measure of combustion efficiency, *the Agency believes it reasonable to develop an alternative means for this class of furnaces to demonstrate combustion efficiency*).

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[6] The final rule permitted bypass duct sampling, so cement kilns with bypass ducts could assess the levels of CO or HC generated by their HWDF combustion. 56 Fed. Reg. at 7222, App. at 225a, *codified at* 40 C.F.R. § 266.104(g).

56 Fed. Reg. at 7155-56, App. at 93a-95a (footnotes omitted) (emphasis added).

EPA did not adopt the site-specific HC baseline standard it had proposed for Tier III in 1989 and 1990; instead, without any explanation, it established a dual HC and CO baseline standard. EPA required cement kilns to set "baseline" emission limits for both CO and HC when not burning HWDF and then operate within those limits when burning HWDF. In practice, CO and HC emissions were too variable to stay under a baseline based upon an average. In some kilns, when an operator tried to minimize one parameter, the other exceeded its baseline.[7] *See Horsehead*, 16 F.3d at 1269, App. at 45a-47a. Petitioners, surprised by an impractical dual baseline concept that had never been part of the rulemaking process, sought judicial review.

Petitioners argued, and the D.C. Circuit agreed, that EPA had promulgated the dual baseline Tier III standard without adequate notice or opportunity for comment, and without a reasoned basis in the record. Petitioners further argued that EPA had conceded that Tiers I and II did not represent good operating practice for Petitioners' kilns, and that without a reasonable Tier III, it would be unreasonable to require Petitioners' kilns to show combustion efficiency under Tiers I or II. *See* Excerpt from Joint Brief of Industry Petitioners and Intervenors in Support, *reprinted in* Appendix at 227a. EPA never disputed, and thus conceded, this claim, so Petitioners did not further address the issue in reply.

However, after it vacated and remanded the Tier III standard, the D.C. Circuit held that until EPA decides to reconsider the remanded Tier III, Petitioners' kilns will be regulated under Tiers I and II alone. The Court stated:

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[7] EPA later used a "technical amendment" to insert a previously-absent "variability factor" into Tier III, but highly-variable emission levels still precluded some kilns from operating within the dual baselines during normal operations. *See* 57 Fed. Reg. at 38,558, App. at 50a-58a.

> [EPA] recognized the effects that the Tier I and Tier II standards would have on wet kilns and attempted to accommodate them in the Tier III standard. The lack of notice and a reasoned basis for the Tier III standard necessitates that it be vacated, but the inapplicability of the other two to wet kilns, standing alone, does not persuade us that their promulgation was arbitrary and capricious. The EPA issued those regulations as protective of human health and the environment; [sic] and if it is technologically impossible for wet process kilns to meet them, they can simply stop using hazardous waste as fuel."

Horsehead, 16 F.3d at 1270, App. at 48a.

The D.C. Circuit's holding relies upon assumptions that have no support in, and blatantly conflict with, the rulemaking record. For example, the D.C. Circuit stated that "ultimately it is PIC emissions that are being regulated." *Id.*, App. at 47a. The D.C. Circuit then stated that "from the standpoint of health and safety, there is no reason to distinguish between PICs emitted from the combustion of hazardous wastes and those emitted from the combustion of [raw materials]." *Id.* The D.C. Circuit also stated that EPA had contended that its three promulgated tiers represented "the best application of existing scientific knowledge." *Id.*, App. at 48a. Nowhere in the rulemaking record or in its appellate brief did EPA make such a claim.

EPA, unlike the D.C. Circuit, clearly recognized that it was ultimately regulating the methods by which a BIF could prove the quality of its combustion—not its PIC emissions. *See* 56 Fed. Reg. at 7156, App. at 94a. EPA, moreover, also found that the emission of naturally-occurring organic compounds from the raw material "would not raise the types of concerns normally addressed by RCRA," 56 Fed. Reg. at 7155, App. at 94a, and in fact allowed some cement kilns to forgo any monitoring of "raw-material-generated PICs" by permitting them to measure emissions in their bypass duct, rather than their stack.

Petitioners, in their petition for rehearing or rehearing en banc, argued that Tier III had been improperly severed, or that at the least, Petitioners and EPA should brief the issue. The D.C. Circuit denied the petition without comment.

REASONS FOR GRANTING THE WRIT

Severability analysis ("severability") determines whether a defective statutory or regulatory provision can be vacated, and the remainder of the statute or regulation upheld without it. Severability is a judicially-created doctrine based upon principles of judicial restraint. The D.C. Circuit apparently concluded that "judicial restraint" required it to act without input from the parties, reverse the intended effect of EPA's combustion efficiency standards, and effectively create a wholly different regulatory regime to govern Petitioners' kilns. The D.C. Circuit reached this surprising conclusion, in part, by disregarding Supreme Court precedent.

I. THE COURT SHOULD GRANT CERTIORARI TO ARTICULATE A TEST FOR DETERMINING THE SEVERABILITY OF A FEDERAL REGULATORY PROVISION AND REASSERT THE VITALITY OF *ADDISON* AND *FEDERAL POWER COMMISSION*.

In *Addison v. Holly Hill Fruit Products, Inc.*, 322 U.S. 607, 618-19 (1944) and *Federal Power Commission v. Idaho Power Co.*, 344 U.S. 17, 20 (1952), this Court condemned lower courts that had severed provisions of agency regulatory decisions and indicated that remand, not severance, is the proper remedy for agency errors. In *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 294 (1988), this Court did sever unauthorized provisions from agency regulations. Although no reasonable court could assume that the brief and simple severability analysis in *K Mart* overruled well-settled, reasoned precedents, *Addison* and *K Mart* did address the severability of regulatory provisions that reflected unreasonable constructions of governing statutes using very different approaches to severability.

These inconsistent precedents also fail in two other respects. No case has articulated a general test for determining the severability of a regulatory provision, and no case has squarely addressed the issue arising in this case: the severability of a regulatory provision that would have been within the scope of the agency's authority, but for procedural errors during its promulgation.

The "substantial doubt" test created by then-Judge Scalia synthesizes the principles set forth in *Addison* and *Federal Power Commission* and provides a sound framework for analyzing the severability of regulatory provisions. *See North Carolina v. Federal Energy Regulatory Comm'n*, 730 F.2d 790 (D.C. Cir. 1984). Substantial doubt analysis would ensure that reviewing courts respect both agency discretion to regulate and agency intent reflected in an administrative record.

A. Cases Following *Addison v. Holly Hill Fruit Products, Inc.* Hold That a Federal Court Intrudes Upon the Discretion of an Administrative Agency if Severance Alters the Nature or Effect of the Agency's Actions.

In *Addison v. Holly Hill Fruit Products, Inc.*, 322 U.S. 607 (1944), Holly Hill employees claimed that they were eligible for the wage protection of the Fair Labor Standards Act. However, Congress had exempted certain employees from the Act, including persons engaged in the canning of agricultural or horticultural commodities" "within the area of production (as defined by the Administrator)." *Id.* at 612 n.4. The Administrator's regulations defined an individual as being within an "area of production" if the individual canned materials that came from farms in the general vicinity of the place of employment and the number of employees engaged in canning operations did not exceed seven. *Id.* at 610. This regulatory provision prevented eight-or-more-person canning operations from being within an "area of production." The Sixth Circuit held that this regulation was an unreasonable

construction of the statute, and severed the "seven-or-fewer" limitation from the definition of "area of production." Without the severed limitation, any facility that canned materials coming from its "general vicinity was no longer subject to the Fair Labor Standards Act." *See id.* at 618.

This Court agreed that the "seven-or-fewer" limitation was an unreasonable construction of the statute. However, the Court refused to sever the "seven-or-fewer" limitation from the administrator's definition of "area of production":

> [W]e cannot follow [the Sixth Circuit] in deleting this part of the administrative regulation and, by applying what remains of the defiintion, exempting Holly Hill's employees from the requirements of the Act. Since the provision as to the number of employees was not authorized, the entire definition of which that limitation was a part must fall. We can hardly assume that the Administrator would have defined "area of production" merely by deleting the employee provision, had he known of its invalidity. It would be the sheerest guesswork to believe that elimination of an important factor in the Administrator's equation would have left his equation unaffected even if he did not here insist upon its importance. It is not for us to write a definition. That is the Administrator's duty.

Id. at 618-19.

The Court held that the definition of "area of production" should be remanded to the Administrator with instructions to repromulgate a new definition. The Court held that this approach would not be an intrusion: "The district court would not be telling the Administrator how to exercise his discretion, but would merely require him to exercise it." *Id.* at 622-23.

In the next significant precedent, *Federal Power Commission v. Idaho Power Co.*, 344 U.S. 17 (1952), the Federal Power Commission imposed conditions on the grant of a license. The D.C. Circuit struck down the

conditions, but affirmed the grant of the license. This Court stated that the D.C. Circuit had exceeded its authority:

> It is the Commission's judgement on which Congress has placed its reliance for control of licenses. When the court decided that the license should issue without the conditions, it usurped an administrative function. There doubtless may be situations where the provision excised is separable from the remaining parts or so minor as to make remand inappropriate. But the guiding principle, violated here, is that the function of the reviewing court ends when an error of law is laid bare. At that point, the matter goes to the Commission for reconsideration.

Id. at 20. The federal courts' power to "affirm, modify or set aside" agency actions in whole or in part thus "is not power to exercise an essentially administrative function." *Id.*

In *Addison* and *Federal Power Commission*, this Court articulated three reasons why federal courts should not sever objectionable elements from agency decisions and uphold the remains. First, when severance materially alters agency regulations, a court has created new regulations and thus "usurped an administrative function." *Federal Power Comm'n*, 344 U.S. at 20. This holding evokes the fundamental principle of the separation of powers. If, for example, Congress instructs EPA to regulate the burning of HWDF "as may be necessary to protect human health and the environment," then deciding whether EPA regulations would be "necessary" and "protective of human health" if provisions were severed from them "is an administrative, not a judicial, decision." *Id.* at 21; *see also* 42 U.S.C. 6924(q).

Second, *Addison* indicates that the broad discretion Congress entrusts to administrative agencies will often prevent courts from deducing what the agency "would have done" if it knew of its error. *See Addison*, 322 U.S. at 618-19 (calling attempts to determine what the Administrator would have done had he known of his

error "sheerest guesswork"). Under such circumstances, the agency, not the court, must repair defects in its regulations. *See NLRB v. Food Store Employees Union*, 417 U S. 1, 14-15 (1974) (when a court concludes that an agency with broad discretion to fashion remedies has abused its discretion by failing to provide a remedy justified by the facts, the court must remand, not insert the requested relief into the agency's order).

Third, *Addison* indicates that judicial guesswork and intrusion are particularly inappropriate if the court can remand and have the agency that created the regulations correct its own errors. *See Addison*, 322 U.S. at 619-20; *see also Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 13 (1945). Since *Addison*, the Court has continued to remand, rather than sever, when an entity subject to a remand has greater expertise regarding the potentially-severable provisions.[8]

The D.C. Circuit formerly looked to *Federal Power Commission* to determine the severability of regulatory provisions. *See North Carolina v. FERC*, 730 F.2d 790 (D.C. Cir. 1984). Other circuits continue to follow *Federal Power Commission*. *See, e.g., Thompson v. United States Dep't. of Labor*, 885 F.2d 551, 557-58 (9th Cir. 1989) (holding that the court had to remand an order containing an unreasonable provision to the Secretary of Labor because striking the provision and affirming the rest of the order would intrude upon administrative functions). By contrast, the D.C. Circuit's decision to sever Tier III and regulate Petitioners' kilns under Tiers I and II is wholly inconsistent with *Addison* and *Federal Power Commission* and the precedents of other circuits.

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[8] *See, e.g., Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 624 (1985) (remanding the severability of an unconstitutional provision in a New Mexico statute to the state courts); *Zobel v. Williams*, 457 U.S. 55, 64-65 (1982) (remanding the severability of an unconstitutional provision in an Alaska state statute to the Alaska courts, even though the Alaska statute included a severability clause).

B. This Court Has Never Held That Federal Courts Should Determine the Severability of Regulatory Provisions Under the "Presumptive Severability" Test Traditionally Used When Statutory Provisions Are Declared Unconstitutional.

Traditionally, severability analysis was used to strike unconstutional provisions from federal statutes. *See, e.g., Champlin Refining Co. v. Corporation Comm'n of Oklahoma*, 286 U.S. 210, 234-35 (1937). *Champlin Refining* was an early case that articulated a test for determining the severability of an unconstitutional statutory provision:

> The unconstitutionality of a part of an Act does not necessarily defeat or affect the validity of its remaining provisions. Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as law.

Id.

In subsequent cases, the Court stressed that severability turns on legislative intent. *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 683 (1987); *Regan v. Time, Inc.*, 468 U.S. 641, 653 (1984).[9] However, since legislative intent is often difficult to determine, recent cases have expanded the circumstances in which severability is presumptively proper. The Court has long recognized that a severability clause makes severability presumptively proper. *See Alaska Airlines v. Brock*, 480 U.S. at 686 (citing *Champlin Refining Co.*, 286 U.S. at 235)). Later, the Court held "[i]n the absence of a severability clause, however, Congress' silence is just that—silence—and does not raise a presumption against severability." *Alaska Airlines,*

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[9] The Court has also stressed that severability is an outgrowth of judicial restraint. *See Alaska Airlines, Inc. v. Brock*, 480 U.S. at 684 (holding that a court "should refrain from invalidating more of a statute than is necessary" and maintain acts insofar as they are valid); *Tilton v. Richardson*, 403 U.S. 672, 684 (1971) (" 'The cardinal principle of statutory construction is to save and not to destroy'.") (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937)).

Inc. v. Brock, 480 U.S. at 686 (citing *United States v. Jackson*, 390 U.S. 570, 585 n.27 (1968)). In 1984, a plurality of the Court stated that severability is always presumed: "Whether an unconstitutional provision is severable is largely a question of legislative intent, but the presumption is in favor of severability." *Regan v. Time, Inc.*, 468 U.S. at 653. These recent cases have often found unconstitutional statutory provisions to be severable.[10]

One recent case from this Court, subsequently relied upon by the D.C. Circuit, seemingly tracked *Champlin Refining*'s language when discussing of the severability of a regulatory provision. In *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281 (1988), the Court reviewed Customs Service regulations promulgated under the Tariff Act of 1930. *Id.* at 287-90. The Tariff Act prohibits the import of items bearing a U.S.-owned trademark " 'unless written consent of the owner of such trademark is produced at the time of making entry'." *Id.* at 288 n.1 (quoting 19 U.S.C. § 1526(a)). Customs Service regulations permitted the import of goods bearing a trademark simulating or duplicating a U.S. trademark if " '[t]he articles of foreign manufacture bear a recorded trademark or trade name applied under authorization of the U.S. owner'." *Id.* at 288 n.2 (quoting 19 C.F.R. § 133.21(c)(3)). This exception could have permitted imports bearing "authorized" trademarks even if the written consent of the owner of the trademark was not produced at the time of making entry. The Court held that this exemption was not a reasonable construction of the Tariff Act. *Id.* at 293-94. The Court severed the exemption, but did not discuss or

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[10] *See New York v. United States*, 112 S. Ct. 2408, 2433-34 (1992) (finding a provision requiring states to take title to some radioactive wastes unconstitutional and severable); *Alaska Airlines, Inc. v. Brock*, 480 U.S. at 696-97 (finding unconstitutional and severable a provision giving Congress a "legislative veto" over Department of Labor regulations); *Regan v. Time, Inc.*, 468 U.S. at 652-53 (finding unconstitutional and severable an exception in a criminal statute that permitted the use of images of U.S. currency for "newsworthy purposes").

cite *Addison, Federal Power Commission* or any other severability case. Its brief analysis was suggestive of the "presumptive severability" cases: "[t]he severance and invalidation of this subsection will not impair the function of the statute as a whole, and there has been no indication that the regulation would not have been passed but for its inclusion." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. at 294.

K Mart presented an easy severability question, and one that raises the same issues that arise when Congress lacks authority to enact a particular statutory provision. The Court held that the Customs Service had no authority to promulgate the regulation at issue, and that the impermissible regulation could be severed without any effect on the remaining regulatory regime. *Id. K Mart* did not purport to establish a test for determining the severability of regulatory provisions, nor did it address the more difficult questions that arise when an agency has been delegated authority to promulgate a regulation, but fails to promulgate it correctly.

Citing *K Mart*, the D.C. Circuit recently asserted that the analysis used to determine the severability of unconstitutional statutory provisions "differs little in the context of invalidating provisions of regulations promulgated by an agency." *Alliance for Community Media v. FCC*, 10 F.3d 812, 830 (D.C. Cir. 1993), *vacated for reh'g en banc*, 15 F.3d 186 (1994). Paradoxically, in the same case, the D.C. Circuit also cited *Federal Power Commission* and asserted that "where an agency is involved" the court should simply remand the invalid regulations to the agency whenever there is substantial doubt as to whether the agency intended its regulations to be severable. *Id.* (citing *North Carolina v. Federal Energy Regulatory Comm'n*, 730 F.2d at 795-96; *Federal Power Comm'n*, 344 U.S. at 20-21). One of these two assertions is manifestly wrong. If courts must consider the option of remand and accord special deference if an agency incorrectly promulgates regulations otherwise within its authority, then

regulatory severability analysis is necessarily different from statutory severability analysis.

C. If Adopted by This Court, Justice Scalia's "Substantial Doubt" Test Would Prevent Judicial Intrusion Into Administrative Functions and Eliminate Inconsistencies in the Court's Precedents.

Currently, federal law on the severability of federal regulatory provisions is fragmented and somewhat ambiguous. The Court should grant certiorari and clarify the law. *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281 (1988) did not, by implication, overrule *Addison* and *Federal Power Commission*. The reasoning of these cases is still sound: when severance alters the scope or effect on an agency's regulations, a federal court necessarily creates a new regulatory regime and usurps an administrative function. This is particularly true when the agency is authorized to promulgate the severed provisions, but simply failed to follow proper procedures when doing so. *See Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 13 (1945) (citing *Addison* and holding that agencies which fail to make adequate findings to support their decisions "are ordinarily entitled to have the case remanded for further consideration").

If an agency promulgates regulations within the scope of its regulatory authority, but fails to follow proper procedures, presuming severability would be inherently intrusive. If the defect in an agency's regulations is procedural, the agency could, in good faith, repromulgate the stricken provisions, or any number of variants thereof. In contrast, a court reviewing an unconstitutional regulation, or a regulation exceeding the scope of an agency's authority, need only simply determine whether the rest of the statute or regulation would have become law without the invalid provision—because an agency acting in good faith would not have promulgated an unconstitutional or unauthorized provision.

This case illustrates the point. The D.C. Circuit did not hold that the concept of a Tier III was unreasonable or

inconsistent with the Resource Conservation and Recovery Act. It held that EPA had failed to properly notice and provide a reasoned basis for the Tier III EPA adopted. EPA could correct this error by repromulgating the same Tier III or by promulgating a different Tier III, such as the HC-baseline Tier III EPA proposed in 1989 and 1990. *See* 55 Fed. Reg. at 17,885, App. at 130a; 54 Fed. Reg. at 43,724, App. at 155a. EPA's many options make it particularly difficult to determine what EPA would have done had it known of its error. *See, e.g., Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 13 (1945) (holding that when an agency acts within the scope of its statutory authority, but fails to adequately justify its decision in the record, remand is generally required).

However, the "remand approach" for determining severability has shortcomings. When a court reviews a statute, legislative intent determines severability. *Alaska Airlines, Inc. v. Brock*, 480 U.S. at 683 n.5. The same principle should apply in the administrative context. Moreover, a rulemaking record provides much better evidence of "administrative intent" than the committee reports and floor comments that must be used to determine legislative intent. Interests in judicial and administrative economy suggest that a court should not remand when the rulemaking record clearly shows the agency's intent.

In *North Carolina v. Federal Energy Regulatory Commission*, 730 F.2d at 795-96, Judge (now Justice) Scalia recognized that *Addison* and *Federal Power Commission's* concern for judicial intrusion would not preclude severance if the agency's intent is clear. *See also Zuber v. Allen*, 402 F.2d 660, 674 (D.C. Cir. 1968) (holding that *Addison* did not require remand in all circumstances), *aff'd*, 396 U.S. 168 (1969). Judge (now Justice) Scalia held as follows:

> Whether an administrative agency's order or regulation is severable, permitting a court to affirm it in part and reverse it in part, depends upon the issuing agency's intent. Where there is substantial doubt that the agency would have adopted the same disposition

> of the unchallenged portion if the challenged portion were subtracted, partial affirmance is improper.

North Carolina v. Federal Energy Regulatory Comm'n, 730 F.2d at 795-96 (citing *Federal Power Comm'n*, 344 U.S. at 20-21; *Addison*, 322 U.S. at 618-19).

Justice Scalia's "substantial doubt" test requires a reviewing court to analyze the administrative record and determine that the record clearly shows how the agency would have disposed of the invalid provisions. *See North Carolina v. Federal Energy Regulatory Comm'n*, 730 F.2d at 795-96. If the reviewing court has "substantial doubts" about the disposition the agency would have made, it must remand the regulations to the agency. *See Addison*, 322 U.S. at 618-19.

II. THE COURT SHOULD GRANT CERTIORARI BECAUSE UNDER ANY RECOGNIZED SEVERABILITY ANALYSIS, THE D.C. CIRCUIT'S DECISION TO SEVER TIER III AND REGULATE PETITIONERS' KILNS UNDER TIERS I AND II DISREGARDS THIS COURT'S UNEQUIVOCAL COMMAND THAT SEVERANCE BE CONSISTENT WITH LEGISLATIVE OR ADMINISTRATIVE INTENT.

If the Court grants certiorari, it should adopt Justice Scalia's "substantial doubt" test. However, under any recognized analysis, the D.C. Circuit disregarded this Court's precedents by disregarding a rulemaking record that clearly established EPA's intent. The severability of Tier III is a question of administrative intent. *Cf. Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 683 n.5 (1987). In this case, the rulemaking record clearly shows that EPA did not intend to regulate Petitioners' kilns under Tiers I and II without a Tier III.

The record reveals the following critical facts about EPA's intent:

- EPA's goal was to identify methods for assessing the combustion efficiency of BIFs. 52 Fed. Reg. at 16,996, App. at 179a.

- Because EPA assumed that any facility that maintained good HWDF combustion did not emit significant levels of PICs, 56 Fed. Reg. at 7150, App. at 71a, EPA found it reasonable to devise alternative combustion efficiency standards useful to different classes of BIFs. *Id.* at 7156, App. at 94a-95a.

- Whenever industry showed that previously-promulgated standards were not suitable for showing the combustion efficiency of particular classes of BIFs, EPA created new standards, citing the need for "flexible" standards that "avoid major economic impacts on the regulated community." *See* 54 Fed. Reg. at 43,722, App. at 147a.

- EPA recognized that many cement kilns would be unable to meet Tier I or Tier II stack emission limits because of CO and HC emissions generated by the calcination of raw materials—"any THC (or CO) resulting from this phenomenon has nothing to do with combustion or hazardous waste fuel." *Id.* at 43,724, App. at 155a.

- Because cement kilns burning HWDF efficiently could emit levels of HC and CO far exceeding the emission levels prescribed by Tiers I and II, EPA expressly found that it was reasonable to create an alternative means for cement kilns without bypass ducts to assess the efficiency of their combustion processes. 56 Fed. Reg. at 7156, App. at 95a.

- In 1989 and 1990, EPA proposed, and never rejected a site-specific, single-baseline Tier III. *See* 55 Fed. Reg. at 17,885, App. at 130a; 54 Fed. Reg. at 43,724, App. at 155a. The D.C. Circuit found that this proposed single-baseline Tier III was materially different from the duel-baseline Tier III promulgated by EPA. *Horsehead,* 16 F.3d at 1267-68, App. at 41a-45a.

This record makes EPA's intent clear. Whenever EPA realized that proposed standards would arbitrarily preclude facilities from proving combustion efficiency, EPA

proposed additional standards. Quite simply, Tier III was intended to correct arbitrary barriers to compliance that Tiers I and II would have imposed upon Petitioners' kilns. EPA, had it known of Tier III's defects, would have implemented one of the other Tier III options it had previously proposed.

Under a *Champlin Refining* analysis, this record overwhelms any presumption of severability by making it "evident" that EPA, had it known of the defects in its Tier III standard, would not have subjected Petitioners' kilns to the Tier I and II standards. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. at 294. Under the "substantial doubt" test, EPA found it reasonable to create a Tier III for Petitioners' kilns, it created a Tier III, and it had viable options for modifying or recrafting Tier III. Tier III rationalized EPA's scheme for assessing combustion efficiency in cement kilns without bypass ducts; it was a central and inseverable element of EPA's regulatory scheme for such kilns. This record creates substantial doubt that EPA would have forced Petitioners to use "inappropriate" Tier I and Tier II combustion efficiency standards when other viable Tier III options existed. *See North Carolina v. Federal Energy Regulatory Comm'n*, 730 F.2d at 796. Under either test, the D.C. Circuit erred by severing Tier III.[11]

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[11] The D.C. Circuit's decision to sever Tier III without input or briefing from the regulating agency or the regulated challengers also conflicts with Seventh Circuit procedure and the precedents of this Court. In *Schurz Communications, Inc. v. FCC*, 982 F.2d 1043, 1055 (7th Cir. 1992) the Seventh Circuit held that the FCC's financial interest and syndication rules lacked a reasoned basis in the record. The FCC order at issue had promulgated new rules and vacated the previously-existing rules. The parties had not realized that vacating the order would "resurrect" old rules that the FCC had criticized. *Id.* at 1056. The Court therefore required a supplemental briefing from the parties.

In this case, however, the D.C. Circuit severed Tier III from EPA's regulations without any briefing from EPA. A federal court that severs regulatory provisions risks interfering with the "administrative functions" of federal agencies. *Federal Power Comm'n,*

Although the "substantial doubt" test shows that Tier III was inseverable, it would not require a court to remand all of the PIC regulations to EPA. Under the "substantial doubt" test, a court attempting to grant relief from an agency error must respect both the agency's authority and its intent. *See North Carolina v. Federal Energy Regulatory Com'n,* 730 F.2d at 795-96. In this case, severance would thwart EPA's intent to provide a practical, flexible Tier III standard for Petitioners' cement kilns, but a broad remand would thwart EPA's intent to require a different class of facility to show combustion efficiency under Tiers I or II.

EPA regulated these two different classes of facilities using two different regulatory schemes. EPA required facilities that could measure the levels of CO and HC generated by their HWDF combustion process (i.e., boilers and cement kilns with bypass ducts) to show combustion efficiency under Tiers I or II. 56 Fed. Reg. at 7221, App. 223a-25a. Tier III was utterly irrelevant to these facilities. On the other hand, EPA found that furnaces that could not measure combustion-generated levels of CO and HC due to raw material generated CO and HC emissions (i.e., cement kilns without bypass ducts) required a Tier III. 56 Fed. Reg. at 7155-56, App. at 93a-95a.

Tiers I and II alone constitute a prescribed regulatory scheme for one class of facilities and an inadequate regulatory scheme for the class of facilities that includes Petitioners' kilns. Therefore, to grant meaningful relief to Petitioners, respect the administrative authority of EPA, and comply with the dictates of judicial restraint, the D.C. Circuit should have vacated and remanded Tier III, and then stayed the application of Tiers I and II to those facilities that were eligible to use Tier III until EPA acted

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344 U.S. at 20-21. Such risks increase when a court severs regulatory provisions, *sua sponte,* without briefing from the affected agency. The D.C. Circuit's *sua sponte* approach to severability thus conflicts with the Seventh Circuit's approach and this Court's precedents.

upon the Tier III remand.[12] In their reply brief, Petitioners requested this relief, and it would have satisfied the interests of the court and the parties.

CONCLUSION

For the reasons set forth above, Petitioners respectfully request that the Court grant a writ of certiorari and review the questions presented by this Petition.

Respectfully submitted,

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[12] Of course, during the pendency of the stay, EPA could set interim requirements to insure that Petitioners' kilns were safely burning HWDF. *Horsehead*, 16 F.3d at 1270, App. at 47a-49a (noting that EPA would be able to promulgate interim standards if it had "good cause").